

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WESTERN EXPLORATION LLC, et al.,

Case No. 3:15-cv-00491-MMD-VPC

## Plaintiffs,

## ORDER

U.S. DEPARTMENT OF THE INTERIOR,  
et al.,

(Defs.' Motion in Limine - dkt. no. 34.)

## Defendants.

## I. BACKGROUND

Defendants seek to limit the testimony that Plaintiffs may present during a hearing on Plaintiffs' Motion for Preliminary Injunction ("PI Motion"), which is scheduled for November 17, 2015. (Dkt. no. 34.) In a Joint Status Report regarding the hearing, Plaintiffs reserved the right to call ten witnesses to testify in support of the PI Motion.<sup>1</sup> (Dkt. no. 30 at 3-5.) Defendants' Motion in Limine ("MIL") raises two objections to Plaintiffs' possible witnesses: first, the witnesses may offer extra-record testimony on the merits of the underlying agency decisions; and second, several witnesses appear to be offered as experts on those agency decisions, which is impermissible under the Administrative Procedure Act ("APA"). (Dkt. no. 34 at 2.) Defendants accordingly ask the

<sup>1</sup>Plaintiffs seek preliminary injunctive relief from amendments (“Plan Amendments”) to the Bureau of Land Management’s and the Forest Service’s land management plans for the Nevada and Northeastern California Greater Sage-Grouse Sub-Region.

1 Court to “limit witness testimony to the question of injury, exclude expert testimony, and  
2 preclude the testimony” of four witnesses. (*Id.* at 10.)

3 In light of Defendants’ request for expedited review, the Court ordered Plaintiffs to  
4 file any response by Monday, November 16, 2015. (Dkt. no. 34.) After reviewing  
5 Plaintiffs’ response (dkt. no. 37), the Court will grant Defendants’ MIL in part.

6 **II. ANALYSIS**

7 First, the Court has already ruled that only Plaintiffs Elko County, Eureka County,  
8 Western Exploration LLC, and Quantum Minerals LLC (collectively, “Original Plaintiffs”)  
9 may offer testimony and argument in support of their PI Motion. (Dkt. no. 36.) Thus, at  
10 the scheduled hearing, the Court will not entertain witnesses whose testimony is  
11 irrelevant to the preliminary injunctive relief requested by the Original Plaintiffs.

12 In two supplements filed in support of the PI Motion, Plaintiffs offered declarations  
13 from Jim French, a Humboldt County Commissioner, Jeanne Herman, a Washoe County  
14 Commissioner, and Fred Stewart, the manager of Ninety-Six Ranch, LLC. (Dkt. nos. 13,  
15 18.) Those declarations describe allegedly irreparable harms that Humboldt County,  
16 Washoe County, and Ninety-Six Ranch would experience because of the Plan  
17 Amendments. But the alleged irreparable harms affecting Humboldt County, Washoe  
18 County, and Ninety-Six Ranch are not relevant to the irreparable harms alleged by the  
19 Original Plaintiffs.

20 Plaintiffs’ witness list also includes Jim French and Jeanne Herman, as well as Bill  
21 Whitney, a representative of the Washoe County Planning Department, and Bob  
22 Schweigert, a range consultant who plans to testify about harms that will affect Ninety-  
23 Six Ranch. (See dkt. no. 30 at 4-5.) In light of the Court’s earlier ruling (dkt. no. 36), the  
24 Court reaffirms that it will not entertain testimony from these witnesses regarding alleged  
25 irreparable harms to Humboldt County, Washoe County, and Ninety-Six Ranch.  
26 However, in their response, Plaintiffs argue that these witnesses can testify on the public  
27 interest prong of a preliminary injunction. (Dkt. no. 37 at 10-13.) This argument is  
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1 somewhat of a stretch, but the Court will permit limited testimony from these witnesses  
2 on the public interest element of Plaintiffs' PI Motion.

3 Next, Defendants argue that Plaintiffs cannot present testimony on Plaintiffs'  
4 likelihood of success on the merits because that testimony constitutes extra-record  
5 evidence. (Dkt. no. 34 at 2-5.) Plaintiffs move for a preliminary injunction under the  
6 National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management  
7 Act ("FLPMA"), the National Forest Management Act ("NFMA"), and the General Mining  
8 Law. (Dkt. no. 4 at 3-4.) The Court reviews agency compliance with these statutes under  
9 the APA. See *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011)  
10 (reviewing NFMA claim under the APA); *ONRC Action v. Bureau of Land Mgmt.*, 150  
11 F.3d 1132, 1135 (9th Cir. 1998) (reviewing NEPA and FLPMA claims under the APA);  
12 *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288, 1290 (9th Cir. 1987) (citing APA  
13 standard of review in addressing agency action under the General Mining Law of 1872).

14 Generally, "a court reviewing agency action under the APA must limit its review to  
15 the administrative record." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d  
16 971, 992 (9th Cir. 2014). The Ninth Circuit, however, has recognized several narrow  
17 exceptions to this rule: "a reviewing court may consider extra-record evidence where  
18 admission of that evidence (1) is necessary to determine whether the agency has  
19 considered all relevant factors and has explained its decision, (2) is necessary to  
20 determine whether the agency has relied on documents not in the record, (3) when  
21 supplementing the record is necessary to explain technical terms or complex subject  
22 matter, or (4) when plaintiffs make a showing of agency bad faith." *Id.* (quoting *Lands*  
23 *Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004)) (internal quotation marks  
24 omitted). Even if a court admits extra-record evidence under one of these exceptions,  
25 the court cannot use such evidence "to determine the correctness or wisdom of the  
26 agency's decision." *Id.* at 993 (quoting *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d  
27 1153, 1160 (9th Cir. 1980)).

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1 Plaintiffs contend that their witnesses — specifically, Tina Mudd and Barry  
 2 Perryman — will testify about scientific evidence that Defendants allegedly failed to  
 3 consider in deciding to issue the Plan Amendments. (Dkt. no. 37 at 5-8.) To the extent  
 4 these witnesses will testify regarding scientific evidence that Defendants failed to  
 5 consider, the Court will allow that testimony.<sup>2</sup> However, as Defendants point out, by  
 6 offering witness testimony on the “inaccuracies,” “inconsistencies,” and ‘errors’ of the  
 7 agencies’ decisions (dkt. no. 34 at 5 (quoting dkt. no. 30 at 3-4)), Plaintiffs seem to be  
 8 inviting the Court to use extra-record evidence precisely to question the “correctness or  
 9 wisdom of the agency’s decision.” *San Luis*, 776 F.3d at 993; (Dkt. no. 34 at 4-5). The  
 10 Court will therefore limit any testimony regarding overlooked or omitted scientific  
 11 evidence to testimony that identifies such missing evidence. Plaintiffs’ witnesses may not  
 12 use omitted scientific evidence to testify about the correctness or wisdom of the decision  
 13 to issue the Plan Amendments.

14 To demonstrate bad faith, Plaintiffs further suggest that their witnesses will  
 15 identify evidence that appears in the full administrative record, but not in the core  
 16 administrative record submitted for purposes of the PI Motion. (Dkt. no. 37 at 8-9.) It is  
 17 not clear why witness testimony is required to identify discrepancies between the  
 18 complete administrative record and the core record prepared for the PI Motion. Counsel  
 19 may point out any relevant documents that appear in the administrative record but not in  
 20 the core administrative record.

21 Finally, Defendants urge the Court to reject testimony from four seemingly expert  
 22 witnesses: Bob Schweigert, Barry Perryman, Tina Mudd, and Debra Struhsacker. (Dkt.  
 23 no. 34 at 5-6.) As the Court noted above, Mr. Schweigert’s testimony appears to  
 24 implicate a more recently added Plaintiff, not one of the Original Plaintiffs. (See dkt. no.  
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26 <sup>2</sup>The Court will also permit testimony about omitted scientific evidence to the  
 27 extent it is necessary to show that Defendants failed to explain their decision. As noted  
 28 above, however, Plaintiffs’ witnesses cannot use that evidence to question the  
 correctness or wisdom of the Plan Amendments.

1 30 at 5 ("[Mr. Schweigert] is expected to testify regarding, *inter alia*, the harm to Plaintiff  
2 Ninety Six Ranch and others similarly situated as well as the environmental harm  
3 resulting from the NVLMP restrictions being challenged."). The Court will not entertain  
4 Mr. Schweigert's testimony regarding alleged irreparable harm to Ninety Six-Ranch,  
5 which is not one of the Original Plaintiffs. Mr. Schweigert may testify, however, on the  
6 public interest prong of Plaintiffs' PI Motion. If Plaintiffs plan to offer Mr. Schweigert,  
7 Professor Perryman, Ms. Mudd, and Ms. Struhsacker as experts, they must qualify them  
8 as such. Fed. R. Evid. 702. The Court will entertain arguments regarding expert  
9 qualification at the hearing.

10 **III. CONCLUSION**

11 It is ordered that Defendants' Motion in Limine (dkt. no. 34) is granted in part and  
12 denied in part.

13 Witnesses Jim French, Jeanne Herman, Bill Whitney, and Bob Schweigert may  
14 testify regarding the public interest element of Plaintiffs' PI Motion. They may not testify  
15 about alleged irreparable harms to entities other than Elko County, Eureka County,  
16 Western Exploration LLC, and Quantum Minerals LLC, the parties who filed the PI  
17 Motion.

18 Furthermore, although Plaintiffs' witnesses may not testify regarding the  
19 correctness or wisdom of the decision to issue the Plan Amendments, they may identify  
20 scientific evidence that was allegedly overlooked or omitted, or to the extent it is  
21 necessary to show that Defendants failed to explain their decision. The Court will not  
22 entertain witness testimony about documents that appear in the full administrative record  
23 but not in the core administrative record, but counsel may present arguments on this  
24 issue.

25 If Plaintiffs wish to offer expert testimony, they must qualify the appropriate  
26 witnesses as experts. The Court will hear any argument regarding qualification at the  
27 hearing.

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Finally, at the scheduled November 17, 2015, hearing, the Court will not entertain opening arguments as the Court has reviewed the briefs relating to the PI Motion. The Court will proceed first with accepting evidence before hearing arguments from counsel.

DATED THIS 16<sup>th</sup> day of November 2015.

MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE